

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

SHERRI JO REID, d/b/a COLONIAL
SQUARE TAX AND ACCOUNTING,

Plaintiff,

vs.

PEKIN INSURANCE COMPANY,

Defendant/Third-Party
Plaintiff,

vs.

STEVE KLOCKE,

Third Party Defendant.

No. 04-CV-1030-LRR

FINAL JURY INSTRUCTIONS

Members of the jury, the written instructions I gave you at the beginning of the trial and the oral instructions I gave you during the trial remain in effect. I now give you some additional instructions.

The instructions I am about to give you are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the trial are not repeated here.

In considering these instructions, the order in which they are given is not important.

INSTRUCTION NO. 1

At the beginning of the trial, I told you that there were two Third-Party Defendants in this case -- Steve Klocke and Kathy Klocke. Since the trial started, however, the situation has changed. Kathy Klocke is no longer a party to this lawsuit. You should not guess about or concern yourselves with the reason for this. You are not to consider this fact when deciding your verdicts in this case.

INSTRUCTION NO. 2

Neither in these instructions nor in any ruling, action, or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what I think of the evidence or what your verdict should be.

INSTRUCTION NO. 3

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it or none of it.

In deciding what testimony to believe, you may consider a witness's intelligence, the opportunity a witness had to see or hear the things testified about, a witness's memory, any motives a witness may have for testifying a certain way, the manner of a witness while testifying, whether a witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe.

In deciding whether or not to believe a witness, keep in mind that people sometimes hear or see things differently and sometimes forget things. You need to consider therefore whether a contradiction is an innocent misrecollection, a lapse of memory, or an intentional falsehood, and that may depend on whether it has to do with an important fact or only a small detail.

INSTRUCTION NO. 4

You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinions on matters in that field and the reasons for their opinions.

Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion and all the other evidence in the case.

INSTRUCTION NO. 5

An expert witness was asked to assume certain facts were true and to give an opinion based on that assumption. This is called a hypothetical question. If any fact assumed in the question has not been proved by the evidence, you should decide if that omission affects the value of the opinion.

INSTRUCTION NO. 6

In these instructions you are told that your verdict depends on whether you find certain facts have been proven. The burden of proving a fact is upon the party whose claim or defense depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight of the evidence. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved. The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

You may have heard of the term “proof beyond a reasonable doubt.” That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

INSTRUCTION NO. 7

There are two types of evidence from which a jury may properly find the truth as to the facts of a case: direct evidence and circumstantial evidence. Direct evidence is the evidence of the witnesses to a fact or facts of which they have knowledge by means of their senses. The other is circumstantial evidence—the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts. The law makes no distinction between direct and circumstantial evidence. You should give all evidence the weight and value you believe it is entitled to receive.

INSTRUCTION NO. 8

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. Consider that testimony as if it had been given here in court.

INSTRUCTION NO. 9

In this case the defendant, Pekin Insurance Company, is a corporation. The fact that the defendant is a corporation should not affect your decision. All persons are equal before the law, and corporations, whether large or small, are entitled to the same fair and conscientious consideration by you as any person.

INSTRUCTION NO. 10

A corporation acts only through its agents or employees and any agent or employee of a corporation may bind the corporation by acts and statements made while acting within the scope of the authority delegated to the agent by the corporation, or within the scope of his/her duties as an employee of the corporation.

INSTRUCTION NO. 11

In the Complaint, Sherri Jo Reid claims Pekin Insurance Company breached a commercial property insurance contract.

To prevail on her insurance contract claim, Sherri Jo Reid must prove all of the following propositions by the greater weight of the evidence:

1. Sherri Jo Reid had a loss by direct physical damage to her building which was covered by the insurance policy with Pekin Insurance Company; and
2. The amount of damage for the reasonable and necessary cost of repair of the direct physical damage to the building not to exceed the policy limit.

If Sherri Jo Reid has failed to prove any of these propositions by the greater weight of the evidence, Sherri Jo Reid is not entitled to damages. If Sherri Jo Reid has proved all of these propositions by the greater weight of the evidence, Sherri Jo Reid is entitled to damages in some amount.

INSTRUCTION NO. 12

In the event you find Sherri Jo Reid is entitled to damages in some amount from Pekin Insurance Company, then you must go on to determine whether Pekin Insurance Company is entitled to damages from Steve Klocke to reimburse Pekin Insurance Company for damages owed to Sherri Jo Reid.

INSTRUCTION NO. 13

In its Third-Party Complaint, Pekin Insurance Company claims Steve Klocke was negligent and should pay Pekin Insurance Company for any damage he caused to Sherri Jo Reid's building.

In order to recover on its third-party claim, Pekin Insurance Company must prove all of the following propositions:

1. Steve Klocke was negligent in one or more of the following ways:
 - a. In using the excavator bucket to strike the foundation wall in such a manner as to create vibrations sufficient to cause damage to Sherri Jo Reid's building;
 - b. In failing to move the foundation materials a safe distance from Sherri Jo Reid's building prior to using the excavator to break up such materials;
 - c. In failing to exercise ordinary care in the demolition and removal of the foundation so as to avoid causing damage to Sherri Jo Reid's building; or
 - d. In failing to utilize reasonable safe alternative methods to remove the foundation wall so as to minimize vibrations;
2. The negligence was a proximate cause of damage to Sherri Jo Reid's building; and
3. The amount of damage.

If Pekin Insurance Company has failed to prove any of these propositions, Pekin Insurance Company is not entitled to damages. If Pekin Insurance Company has proved all of these propositions, Pekin Insurance Company is entitled to damages in some amount.

INSTRUCTION NO. 14

If you find Pekin Insurance Company is entitled to recover damages from Steve Klocke you shall consider the following item:

The reasonable and necessary costs of repairs to the building cannot exceed the actual value of the building at the time the incident in question occurred.

INSTRUCTION NO. 15

“Negligence” means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. “Negligence” is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

INSTRUCTION NO. 16

The mere fact that an incident occurred and that Sherri Jo Reid claims to have sustained damages as a result of that incident does not mean that Steve Klocke was negligent or otherwise at fault in connection with that incident.

INSTRUCTION NO. 17

An act is a “proximate cause” of damage if the act was a substantial factor in producing the damage and the damage would not have happened except for the act.

“Substantial” means that the act had such an effect in producing damage as to lead a reasonable person to regard it as a cause of the damage.

INSTRUCTION NO. 18

The fact that I am instructing you on the proper measure of damages should not be considered as an indication that I have any view as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance in the event that you should find that any party is entitled to damages in accord with other instructions.

If you find in favor of Sherri Jo Reid and against Pekin Insurance Company, then you must award her such sum as you find by the greater weight of the evidence will fairly and justly compensate her for damages that you find were proximately caused to her building by the demolition work *and* which are covered and not excluded in her insurance policy with Pekin Insurance Company.

Further, if you find in favor of Pekin Insurance Company in its claim against Steve Klocke, then you must award Pekin Insurance Company such sum as you find by the greater weight of the evidence will fairly and justly compensate Pekin Insurance Company for damages payable to Sherri Jo Reid that you find were proximately caused to her building by the demolition work by Steve Klocke, not to exceed the actual value of the building at the time the incident occurred.

In arriving at an amount of damages, you cannot establish a figure by taking down the estimate of each juror as to damages and agreeing in advance that the average of those estimates shall be your award of damages. Rather, you must use your sound judgment based upon an impartial consideration of the evidence.

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INSTRUCTION NO. 18 (cont'd)

Remember, throughout your deliberations, you must not engage in any speculation, guess or conjecture. Except where instructed otherwise, you must not award damages under these Instructions by way of punishment or through sympathy. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against any of the parties.

You must award the full amount of damages that Sherri Jo Reid has proved by the greater weight of the evidence.

Further, you must award the full amount of damages that Pekin Insurance Company has proved by the greater weight of the evidence. However, the amount you award for damages must not exceed the amount proximately caused by any wrongful conduct of Steve Klocke as proved by the greater weight of the evidence.

INSTRUCTION NO. 19

Throughout the trial, you have been permitted to take notes. Your notes should be used only as memory aids, and you should not give your notes precedence over your independent recollection of the evidence.

In any conflict between your notes, a fellow juror's notes, and your memory, your memory must prevail. Remember that notes sometimes contain the mental impressions of the note taker and can be used only to help you recollect what the testimony was. At the conclusion of your deliberations, your notes should be left in the jury room for destruction.

INSTRUCTION NO. 20

In conducting your deliberations and returning your verdict, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should, but do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges —judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the Court Security Officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

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INSTRUCTION NO. 20 (cont'd)

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Fifth, I am giving you a verdict form. The verdict form is simply the written notice of the decision that you reach in this case. The answers to the verdict form must be the unanimous decisions of the jury. You will take the verdict form to the jury room, and, when you have completed your deliberations and each of you has agreed on the answers to the verdict form, you will fill out the form, sign it and date it. The foreperson must bring the signed verdict form to the courtroom when it is time to announce your verdict. When you have reached your verdict, the foreperson will advise the Court Security Officer that you are ready to return to the courtroom.

Finally, members of the jury, take this case and give it your most careful consideration, and then without fear or favor, prejudice or bias of any kind, return such verdict as accords with the evidence and these instructions.

DATED this _____ day of _____, 2006.

**LINDA R. READE
JUDGE, U.S. DISTRICT COURT**

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

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SQUARE TAX AND ACCOUNTING,

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STEVE KLOCKE,

Third Party Defendant.

No. 04-CV-1030-LRR

VERDICT FORM

We, the jury, unanimously find the following verdict on the questions submitted to us:

Question 1: **Do you, the jury, find by the greater weight of the evidence that Sherri Jo Reid is entitled to damages from Pekin Insurance Company for breach of the insurance contract? Please answer “yes” or “no.”**

Answer: _____

(If your answer to Question 1 is “yes,” please proceed to Question 2 and answer that question. If your answer to Question 1 is “no,” do not answer any further questions, sign and date this verdict form.).

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VERDICT FORM (cont'd)

Question 2: **State the amount of damages, if any, sustained by Sherri Jo Reid as a result of Pekin Insurance Company denying her insurance claim.**

Answer: \$ _____

(If your answer to Question 2 is "\$0," do not answer any further questions, sign and date this verdict form. If you award some damages go on to consider Question 3.).

Question 3: **Do you, the jury, find by the greater weight of the evidence that Steve Klocke was negligent? Please answer "yes" or "no."**

Answer: _____

(If your answer to Question 3 is "yes," please proceed to Question 3A and answer that question. If your answer to Question 3 is "no," please skip Questions 3A and 3B, and sign and date the verdict form.).

Question 3A: **Do you, the jury, find by the greater weight of the evidence that Steve Klocke's negligence was a proximate cause of the damages to the building owned by Sherri Jo Reid? Please answer "yes" or "no."**

Answer: _____

(If your answer to Question 3A is "yes," please proceed to Question 3B and answer that question. If your answer to Question 3A is "no," please skip Question 3B, and sign and date the verdict form.).

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VERDICT FORM (cont'd)

Question 3B: **State the amount of damages, if any, sustained by the building owned by Sherri Jo Reid which you found by the greater weight of the evidence was proximately caused by Steve Klocke's negligence.**

Answer: \$ _____

(After answering Question 3B, please sign and date the verdict form.).

Dated this ____ day of _____, 2006.

Foreperson

Juror

Juror

Juror

Juror

Juror

Juror

Juror